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Donna Jex vs. JRA, Inc. and James Fillmore and Angela Fillmore : Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

DONNA JEX, Plaintiff, vs. JRA, INC. dba HICKORY KIST DELI, JAMES FILLMORE and ANGELA FILLMORE, Defendants.	**BRIEF OF PETITIONER** No. 20070651

ON CERTIORARI FROM A DECISION OF THE UTAH COURT OF APPEALS

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JURISDICTION OF THE UTAH SUPREME COURT

The Court of Appeals entered its decision on July 19, 2007. This Court has jurisdiction to review the Court of Appeals' decision by writ of certiorari under Utah Code Ann. § 78-2-2(3)(a) and (5).

OPINION OF THE COURT OF APPEALS

The opinion of the Utah Court of Appeals is reported at 2007 UT App 249, 166 P.3d 655 (Utah Ct. App. 2007). A copy of the opinion is included in the appendix.

ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals misconstrued the standards applicable to temporary and permanent conditions in premises liability cases.

On certiorari, the Utah Supreme Court reviews the Court of Appeals' decision for correctness. Pratt v. Nelson, 2007 UT 41, ¶ 12, 164 P.3d 366, 372 (Utah 2007).

CONTROLLING STATUTES AND RULES

Rule 56 of the Utah Rules of Civil Procedure is the only Rule relevant to the questions for review. It states:

> [Summary judgment] shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Lower Courts.

This case arises out of a slip-and-fall accident that occurred at the Hickory Kist Deli ("Hickory Kist") on January 26, 2004 (R. at 290). The plaintiff Donna Jex commenced a premises liability lawsuit on August 18, 2004 against Hickory Kist and its owners, James Fillmore and Angela Fillmore, upon the filing of her Complaint in the Fourth Judicial District Court, Utah County, State of Utah (R. at 4-5).

On January 10, 2006, Hickory Kist and its owners filed a Motion for Summary Judgment and supporting memorandum (R. at 146-113). Jex filed a Reply Memorandum Opposing Defendants' Motion for Summary Judgment and in Support of Motion for Summary Judgment for Plaintiff on February 16, 2006 (R. at 241-155). Hickory Kist and its owners filed a Reply Memorandum in Support of Motion for Summary Judgment on February 24, 2006 (R. at 248-242). They also filed a Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on March 14, 2006 (R. at 273-265). Jex filed a Reply Memorandum in Support of Plaintiff's Motion for Summary Judgment on March 29, 2006 (R. at 279-264). The cross-motions for summary judgment came before the trial court, the Honorable Judge Derek P. Pullan, and were heard on April 5, 2006 (R. at 291-282). The trial court granted the Motion for Summary Judgment of Hickory Kist and its owners and denied Jex's Motion. Id. The trial court issued a written Ruling on the judgment on May 2, 2006. Id. A copy of the trial court's ruling is included in the

appendix.

Donna Jex filed a Notice of Appeal on June 16, 2006. The Utah Court of Appeals heard the matter and issued a decision on July 19, 2007. The opinion is reported at 2007 UT App 249, 166 P.3d 655 (Utah Ct. App. 2007). A copy of the opinion is included in the appendix.

Hickory Kist filed a Petition for Writ of Certiorari to the Utah Supreme Court on August 14, 2007, and Donna Jex filed a cross-petition on September 13, 2007. The Utah Supreme Court granted the petition and cross-petition on December 10, 2007.

B. Statement of Facts.

On January 26, 2004, sometime before 8:30 a.m., Donna Jex entered the Hickory Kist Deli (R. at 290). She was the first customer of the day. Id. While she was shopping, she slipped in a puddle of water on the hardwood floor and fell to the ground, injuring her wrist and back (R. at 289).

There had been new snow earlier that morning (R. at 290). James Fillmore, owner of Hickory Kist, came in the back door of the store at about 5:00 a.m. Id. At about 6:30 a.m. or 7:00 a.m., after removing the snow and spreading ice melt at the front part of the store, Mr. Fillmore walked through the front door of the store all the way to the back to start cooking. Id.

At about 5:30 a.m., Sharlene Barber, an employee of Hickory Kist, came into the store. Id. Sharlene usually turns the lights on but cannot remember turning them on that

day. Id. At about 7:00 a.m. Sharlene put mats on the floor. Id. At some other time that morning before any customers had entered the store, a Pepsi delivery man had entered and walked to the back of the store (R. at 289).

Neither James Fillmore nor Sharlene Barber was aware of the puddle of water on the store floor before Donna Jex's slip and fall accident (R. at 284). Moreover, Donna Jex was not aware of the puddle of water until after she slipped in it (R. at 289).

Donna Jex filed suit against Hickory Kist and its owners, James Fillmore and Angela Fillmore, on August 18, 2004, alleging that Hickory Kist and its owners were liable for the hazardous condition that Ms. Jex encountered on the store floor (R. at 5-4). Hickory Kist and its owners filed a motion for summary judgment on January 10, 2006, arguing *inter alia* that they were not liable as a matter of law because the puddle of water that Ms. Jex slipped in was a temporary condition about which Hickory Kist and its owners had no actual or constructive notice (R. at 146-113).

The trial court, the Honorable Judge Derek P. Pullan, granted Hickory Kist and its owners' Motion for Summary Judgment, finding that liability could not lie against a storeowner for a temporary unsafe condition unless the storeowner had actual or constructive notice (R. at 291-282). The trial court held, *inter alia*, that since Hickory Kist and its owners had no actual or constructive notice of the puddle of water before Jex slipped and fell, Hickory Kist and its owners were entitled to judgment as a matter of law (R. at 286-284).

On appeal, the Utah Court of Appeals affirmed the trial court's ruling that "neither Fillmore nor his employees had actual or constructive knowledge of the puddle of water creating the dangerous condition on Hickory Kist's floor." Jex v. JRA, Inc., 2007 UT App 249 at ¶ 24, 166 P.3d at 661. However, the Utah Court of Appeals reversed the trial court's ruling, holding that Hickory Kist and its owners could be found liable without notice of the puddle of water, if it were found that Fillmore or his employees created it. Id. at ¶¶ 17-18, 166 P.3d at 659-60.

ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT DECIDED THAT A STOREOWNER COULD BE FOUND LIABLE FOR A TEMPORARY UNSAFE CONDITION WITHOUT ANY ACTUAL OR CONSTRUCTIVE NOTICE.

The Court of Appeals misconstrued Utah law when it held that a storeowner may be liable for a temporary condition that he or his employees create but for which he has no actual or constructive notice.

In Schnuphase v. Storehouse Markets, 918 P.2d 476, 478 (Utah 1996), the Utah Supreme Court held that "the owner of a business is not a guarantor that his business invitees will not slip and fall. He is charged with the duty to use reasonable care to maintain the floor of his establishment in a reasonably safe condition for his patrons." citing Preston v. Lamb, 20 Utah 2d 260, 263, 436 P.2d 1021, 1023 (1968); Martin v. Safeway Stores, Inc. 565 P.2d 1139, 1140 (Utah 1977). In the present matter, the Utah Court of Appeals found that there was no evidence that Hickory Kist's owner and

employees exercised anything less than reasonable care in the maintenance of the floors. Jex, 2007 UT App 249 at ¶¶ 16, 24, 166 P.3d at 659 and 661. Nevertheless, the court held that Hickory Kist could be found liable even without a finding that they knew or even should have known of water on the floor of their store. Id. at ¶ 17-18, 166 P.3d at 659-60. Such a ruling is erroneous under Utah law.

In the context of a storeowner's liability in slip-and-fall cases, the Utah Supreme Court has identified two classes of negligence cases:

> The first [class] involves some unsafe condition of a temporary nature, such as a slippery substance on the floor and usually where it is not known how it got there. In this class of cases it is quite universally held that fault cannot be imputed to the defendant so that liability results therefrom unless two conditions are met: (A) that he had knowledge of the condition, that is, either actual knowledge, or constructive knowledge because the condition had existed long enough that he should have discovered it; and (B) that after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it.

Schnuphase, 918 P.2d at 478 (citing Allen v. Federated Dairy Farms, Inc., 538 P.2d 175, 176 (Utah 1975)). The court continued:

> The second class of cases involves some unsafe condition of a permanent nature, such as: in the structure of the building, or of a stairway, etc. or in equipment or machinery, or in the manner of use, which was created or chosen by the defendant (or his agents), or for which he is responsible. In such circumstances, where the defendant either created the condition, or is responsible for it, he is deemed to know of the condition; and no further proof of notice is necessary.

Id. (citing Allen, 538 P.2d at 176).

The distinction between the two types of cases is whether the condition is temporary or permanent. In temporary condition cases, the plaintiff must establish notice. In permanent condition cases, "where the defendant either created the condition, or is responsible for it," notice is presumed.

In the present matter, the Utah Court of Appeals held that:

> [T]here is no direct evidence suggesting that the puddle of water had been there for any significant period of time. Further, there was nothing about the puddle itself suggesting that it had been there for a long time. Nor is there any reasonable inference that the store owner should have been aware of a four-inch puddle of water on the hardwood floor. Therefore, we conclude that conjecture and speculation is the only way to determine the length of time the puddle was on the floor, and thus, it would be improper to impute constructive knowledge to Defendants.

Jex, 2007 UT App. 249 at ¶ 16, 166 P.3d at 659. Nevertheless, the court found that liability could be found under the first (temporary condition) category of cases. Id., at ¶¶ 17-18, 166 P.3d at 659-60. However, the Schnuphase court held that "[u]nder this first theory, 'the liability of the owner of a store should be established only when the condition complained of has existed for a long enough time that the owner should have known about it and corrected it, or has had actual knowledge of the condition complained of.'" Id. at 478, citing Martin, 565 P.2d at 1140.

The court provided a rationale for requiring a finding of notice in Goebel v. Salt Lake City Southern Railroad Co., 104 P.3d 1185, 1195 (Utah 2004). In Goebel, the court reasoned that "outside of a few conceivable but highly improbable circumstances, a party

will always have notice of its own actions." Id. Nevertheless, the court stated, "we believe that failure to repair a defective condition about which one neither knows nor reasonably should know is neither negligent nor unreasonable. That is why notice is a requirement in negligence cases such as this one." Id. Thus, if there is no notice of a temporary dangerous condition, there can be no liability. Id.; Allen, 538 P.2d at 176; Schnuphase, 918 P.2d at 478.

As support for its holding in the present matter, the Utah Court of Appeals cited Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623, 624 (Utah Ct. App. 1991), in holding that "[a]lthough it is well settled that a store owner must have notice of a dangerous condition, 'the variant of this rule . . . is that if the condition . . . was created by the defendant himself or his agents or employees, the notice requirement does not apply.'" Jex, 2007 UT App. 249 ¶ 17, 166 P.3d at 659, quoting Silcox, 814 P.2d at 624. The quote from Silcox was taken from Long v. Smith Food King Store, 531 P.2d 360, 361 (Utah 1973), which states in full:

> [I]n order to impose liability for an injury resulting from some foreign substance or defective condition it must have existed for such time and manner that in due care the defendant either knew or should have known, and remedied it; and the variant thereof, that if the condition or defect was created by the defendant himself or his agents or employees, the notice requirement does not apply.

Id. The foregoing statement of the law is, of course, correct. It accurately recounts the first and second categories of liability, for temporary and permanent conditions, as was

explained in Schnuphase, 918 P.2d at 478. It does not, however, describe two variants of the first type of liability, dealing with temporary conditions. Accordingly, the Utah Court of Appeals misapplied Utah law when it construed the foregoing to find that no notice is required when an owner or employee may have created a temporary unsafe condition.

The Silcox case is distinguishable from the present matter. In that case, a stock cart filled with bags of melting ice was left in a shopping area. Silcox, 814 P.2d at 623. Water from the melted ice spread down an aisle, and a patron slipped and fell in the resulting puddle. Id. The Silcox court held that "[a]n inference could readily be drawn by the jury that the water in which plaintiff fell came from the bags of ice on the cart left in the aisle by a store employee." Id. at 624-25. Notice in that case was not critical to the analysis because, as explained in Goebel, 104 P.3d at 1195, "outside of a few conceivable but highly improbable circumstances, a party will always have notice of its own actions." Certainly, whoever left the stock cart of ice in the shopping aisle in Silcox knew that he or she had done so. In contrast, in Jex, the Utah Court of Appeals specifically found that the Hickory Kist employees had no actual or constructive notice of the puddle of water in which Donna Jex slipped and fell. Jex, 2007 UT App. 249 at ¶¶ 16 and 24, 166 P.3d at 659 and 661. Of course, with no notice of the puddle, the Hickory Kist employees had no way of remedying the unsafe condition. Accordingly, the Utah Court of Appeals erred when it held that Hickory Kist could nevertheless be held liable for that condition. Id. at ¶¶ 17 and 18.

A similarly distinguishable case is Campbell v. Safeway Stores, Inc., 15 Utah 2d 113, 388 P.2d 409 (1964). In Campbell, the plaintiff tripped over a small empty cardboard box that had been left in a grocery store aisle, causing her to fall and suffer injuries. Id. at 114, 388 P.2d at 410. The court found that a jury could reasonably conclude that it was more likely than not a store employee that negligently left the empty box in the aisle. Id. at 115-16, 388 P.2d at 410-11. Accordingly, the court found it unnecessary to determine whether the store checker at the end of the aisle had adequate time to discover the box and remove it. Id. Just as in Silcox, supra, notice was not at issue in Campbell because surely the store employee who had left the box in the aisle was aware when he or she had done so.

In Koer v. Mayfair Markets, 19 Utah 2d 339, 343, 431 P.2d 566, 569 (1967), the court held that:

> In cases such as the present one which involve a loose object causing one to fall, it is important to distinguish between the situation where the object causing the injury was placed on the floor by the employer-store or its employee, or placed there by some third person. If it is established that the object causing the injury was placed there by the former, or that they were aware of its presence, a prima facie case for the jury is established on the issue of negligence.

Id. The Koer case involved a grape on the floor of a grocery store which caused the plaintiff to slip and fall. Id. at 341, 431 P.2d at 567. However, there was no evidence to suggest that the grape was put there by a store employee. Id. at 343, 431 P.2d at 569. Accordingly, the Koer case does not discuss whether a storeowner may be found liable

for a loose object on the ground that an employee may have deposited but where there is a specific finding that neither the storeowner nor its employee had any actual or constructive knowledge of its existence. Hickory Kist has not found any cases that discuss such a scenario. Nevertheless, given the Utah Supreme Court's more recent discussions of notice in premises liability cases such as Schnuphase and Goebel, supra, a more fair and consistent ruling should be that a storeowner and its employees should be found liable if it is shown that they had actual or constructive knowledge of the temporary unsafe condition. If, as in Silcox and Campbell, supra, actual or constructive notice of the condition can be inferred from the facts of the case, liability should be found. However, where there is no actual or constructive knowledge of the condition, there should be no liability.

In the present matter, the court of appeals found that "there is no direct evidence indicating who actually caused the water puddle."[1] Jex, 2007 UT App 249 at ¶ 18, 166 P.3d at 660. Moreover, the court found that "there is no direct evidence suggesting that the puddle of water had been there for any significant period of time. Further, there was nothing about the puddle itself suggesting that it had been there for a long time." Id. at ¶ 16, 166 P.3d at 659. Given those findings, the holding in Schnuphase, 918 P.2d at 478,

[1] Even though the court of appeals ultimately held that a jury could reasonably infer that the puddle was created by Hickory Kist's owner or employee, it observed that "the evidence suggests that the source of the water puddle could have been Fillmore, Barber, the Pepsi salesman, or even Jex herself." Id. Moreover, it should be acknowledged that the source of the water puddle may even have been some other source that has not yet been considered.

should control, that where it is not known how a temporary, unsafe condition got there, a storeowner should not be found liable unless he had actual or constructive knowledge of the condition. To hold otherwise would be fundamentally unfair and contrary to Utah law. See Goebel, 104 P.3d at 1195 ("failure to repair a defective condition about which one neither knows nor reasonably should know is neither negligent nor unreasonable").

CONCLUSION

In the present matter, the Utah Court of Appeals erred when it held that Hickory Kist could be found liable for a temporary unsafe condition about which it neither knew nor reasonably should have known. Accordingly, the Utah Supreme Court should reverse the Court of Appeals' decision and affirm the trial court's ruling that Hickory Kist is entitled to judgment as a matter of law.

DATED this 22 day of January, 2008.

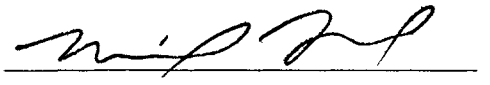
STRONG & HANNI

Robert L. Janicki
Michael L. Ford
Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22 day of January, 2008, a true and correct copy of the foregoing **BRIEF OF PETITIONER** was served by U. S. First Class Mail, postage prepaid, addressed to the following:

Denton M. Hatch
128 West 900 North
Spanish Fork, Utah 84660



Appendix A

IN THE UTAH COURT OF APPEALS

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Donna Jex, Plaintiff and Appellant, v. JRA, Inc., dba Hickory Kist Deli; James Fillmore; and Angela Fillmore, Defendants and Appellees.	OPINION (For Official Publication) Case No. 20060571-CA F I L E D (July 19, 2007) 2007 UT App 249

Fourth District, American Fork Department, 050100121
The Honorable Derek P. Pullan

Attorneys: Denton M. Hatch, Spanish Fork, for Appellant
Robert L. Janicki and Michael L. Ford, Salt Lake City, for Appellees

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Before Judges Billings, Orme, and Thorne.

BILLINGS, Judge:

¶1 Plaintiff Donna Jex appeals the trial court's order granting summary judgment in favor of Defendants JRA, Inc. dba Hickory Kist Deli, James Fillmore, and Angela Fillmore. We affirm in part and reverse and remand in part.

BACKGROUND

¶2 On the morning of January 26, 2004, new snow had just fallen. James Fillmore, owner of Hickory Kist Deli (Hickory Kist), arrived at Hickory Kist for work at approximately 5:00 a.m. He entered the store through the back door. At about 5:30 a.m., Sharlene Barber, an employee at Hickory Kist, also arrived at the store for work. Generally, Barber turns on the store lights when she first arrives at the store, but Barber cannot remember whether she turned the lights on that morning.

¶3 At approximately 6:30 or 7:00 a.m., Fillmore finished removing snow from outside the front of the store and spreading

ice melt over the front walkways. He then walked through the front door and proceeded to the back of the store to begin cooking. Around 7:00 a.m., Barber placed mats on the floor at the front of the store. Once the mats were down, a person could walk on the mats from the front door of the store to the cash register located approximately twenty-five feet away. However, upon reaching the cash register, a person would have to step off the mats and onto the hardwood floor to proceed to the back of the store.

¶4 Jex came into Hickory Kist sometime before 8:30 a.m. She was the first customer of the day. However, sometime before Jex entered the store, a Pepsi salesman had entered and walked to the back of the store. When Jex entered the store, she noticed that the lights in the store were dim, as if some lights had not yet been turned on. Jex reached the area in the store where the cash register is located and then turned right to go to the back of the store. She intended to place an order and noticed that nobody was at the counter. As she turned, she slipped on the hardwood floor due to a puddle of water approximately four inches in diameter.

¶5 Although Fillmore did not inspect the floor prior to the accident that morning, he speculated that the water either came from his shoes or Jex's shoes. Jex was wearing boots with new, but small, tread. Fillmore and Barber were both wearing shoes with deep tread.

¶6 Fillmore knew that for persons wearing hard rubber shoes, the hardwood floor was slippery when wet. Typically, Fillmore decides where to place the mats in his store, and although he had placed a mat in the area where the accident occurred on other occasions, he did not place a mat there at the time of the accident because the one he intended to use had a turned-up edge. Moreover, Fillmore acknowledged that keeping floors clean and water free is important; therefore, he instructs employees to stop what they are doing and take care of the floor if there is something on the floor. In maintaining the store's cleanliness throughout the day, Hickory Kist employees are required to perform various tasks such as wiping down the tables and ensuring that everything is in proper order for customers. The employees' daytime tasks do not, however, include periodically mopping the store floors. Instead, this task is performed at night after the store is closed.

¶7 Jex broke her wrist and injured her back when she fell in Hickory Kist. She filed this lawsuit to recover for her injuries. Jex and Defendants filed cross-motions for summary judgment. The trial court granted Defendants' summary judgment

motion and denied Jex's summary judgment motion. Jex now appeals.

ISSUES AND STANDARD OF REVIEW

¶8 Jex argues that the trial court erred when it granted summary judgment in favor of Defendants. Specifically, Jex asserts that the trial court erred in holding that she could not recover under either of the two negligence theories she asserted against Defendants for the injuries she received from her slip-and-fall accident in Hickory Kist. Jex also argues that summary judgment in this case is improper because issues of material fact exist. "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). "On appeal, we review the district court's ruling on summary judgment for correctness." Jackson v. Mateus, 2003 UT 18,¶6, 70 P.3d 78.

ANALYSIS

¶9 In Utah, a business owner is not required to ensure that his business invitees will not slip and fall. See Martin v. Safeway Stores, Inc., 565 P.2d 1139, 1140 (Utah 1977) ("[P]roperty owners are not insurers of the safety of those who come upon their property, even though they are business invitees."); Preston v. Lamb, 20 Utah 2d 260, 436 P.2d 1021, 1023 (1968). Instead, a business owner "is charged with the duty to use reasonable care to maintain the floor of his establishment in a reasonably safe condition for his patrons." Schnuphase v. Storehouse Mkts., 918 P.2d 476, 478 (Utah 1996) (quotations and citation omitted).

¶10 In considering a store owner's duty of reasonable care in slip-and-fall cases, we note that "slip-and-fall cases have usually been regarded as falling into . . . two different classes [of negligence]." Allen v. Federated Dairy Farms, 538 P.2d 175, 176 (Utah 1975). The first class of cases "involves some unsafe condition of a temporary nature, such as a slippery substance on the floor[,] and usually . . . it is not known how it got there." Id. The "second class . . . involves some unsafe condition of a permanent nature, such as[] in the structure of the building, or of a stairway, etc. or in equipment . . . or its manner of use, which was created or chosen by the defendant (or his agents), or for which he is responsible." Id. Jex argues that she can recover under either the temporary condition or the permanent condition theory of liability.

I. Temporary Condition

¶11 Jex contends that the trial court erred in determining that she could not recover under the temporary condition theory. Under the temporary condition theory, a plaintiff can only recover if the defendant has notice of the dangerous condition. Specifically, the following two conditions must be satisfied: (1) "that [the defendant] had knowledge of the condition, that is, either actual knowledge[] or constructive knowledge because the condition had existed long enough that he should have discovered it; and [(2)] that after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it." Id. "The variant of this rule, however, is 'that if the condition . . . was created by the defendant himself or his agents or employees, the notice requirement does not apply.'" Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623, 624 (Utah Ct. App. 1991) (quoting Long v. Smith Food King Store, 531 P.2d 360, 361 (Utah 1973)). Therefore, "it is important to distinguish between the situation where the [condition] causing the injury was [created] . . . by the employer-store or its employee, or [was created] by some third person." Koer v. Mayfair Mkts., 19 Utah 2d 339, 431 P.2d 566, 569 (1967).

A. Temporary Condition Created by a Third Person

¶12 First, regarding whether Fillmore or his employees had notice of a dangerous condition created by a third party,[1] it is undisputed that neither Fillmore nor his employees had actual knowledge that there was water on the store's hardwood floors. Instead, Jex asserts that they had constructive notice because the water was on the floor long enough that the owner or employees should have discovered it. See Schnuphase, 918 P.2d at 478.

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1. We address Jex's legal argument that Fillmore or Barber had notice of the puddle of water on the floor based solely on the fact that a Pepsi salesman entered the store prior to Jex entering the store. Otherwise, our analysis would be unnecessary. The notice requirement is only at issue if the puddle of water was created by some third person. Since Jex was Hickory Kist's first customer of the day, the only persons who could have created the puddle of water were Jex, Fillmore, Barber, or the Pepsi salesman. Without the Pepsi salesman's entrance into Hickory Kist, there would be no other third person that could have caused the puddle of water on the floor.

¶13 Although Utah case law does not lay out precise factors for determining whether a store owner[2] had constructive notice of a dangerous condition, it does establish that constructive notice is imputed when "the condition had existed long enough that [the store owner] should have discovered it." Id. "Thus, the importance of the time factor to the issue of constructive notice is clear." R.D. Hursh, Annotation, Liability of Proprietor of Store, Office, or Similar Business Premises for Injury from Fall on Floor Made Slippery by Tracked-in or Spilled Water, Oil, Mud, Snow, and the Like, 62 A.L.R.2d 6, § 7b (1958). To establish that a temporary condition existed long enough to give a store owner constructive notice of it, a plaintiff must present evidence that "would show from the condition of the debris on the floor that it had been there for an[] appreciable time." Ohlson v. Safeway Stores, Inc., 568 P.2d 753, 754 (Utah 1977). Constructive notice cannot be grounded on speculation or mere allegation. See Lindsay v. Eccles Hotel Co., 3 Utah 2d 364, 284 P.2d 477, 478 (1955) ("[A] jury cannot be permitted to speculate that the defendant was negligent."); cf. Koer, 431 P.2d at 570 ("[A] mere fall does not prima facie establish a jury question.").

¶14 In determining whether a store owner had constructive notice of a dangerous condition, we look to various Utah slip-and-fall cases. In Lindsay v. Eccles Hotel Co., 3 Utah 2d 364, 284 P.2d 477, 478 (1955), the plaintiff slipped and fell on a small quantity of water on the floor in the defendant's coffee shop. See id. at 478. The water "somehow got on the floor some time after [the plaintiff] was seated." Id. The court found that the plaintiff could not recover because "there was no evidence as to how the water got onto the floor, by whom it was deposited, exactly when it arrived there or that the defendant had knowledge of its presence." Id. Similarly, in Koer v. Mayfair Markets, 19 Utah 2d 339, 431 P.2d 566 (1967), the court determined that a plaintiff could not recover after she slipped and fell on a grape found on the floor of a grocery store. See id. at 569-70. The court reasoned that from the evidence, it was unable "to find any support for the further and necessary inference that th[e dangerous] condition was caused by an act of the defendant, or that the defendant had actual or constructive knowledge of it." Id. at 569. And in Allen v. Federated Dairy Farms, Inc., 538 P.2d 175 (Utah 1975), the court found that a plaintiff could not recover from injuries he sustained after he slipped and fell on some cottage cheese on a store floor. See id. at 177. The court noted that there was "no evidence, nor any basis from which a

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2. For the sake of convenience, our analysis regarding a store owner also encompasses a store owner's employees and agents.

fair inference could be drawn, that the defendant had knowledge of the cottage cheese on the floor." Id.

¶15 In contrast, in Ohlson v. Safeway Stores, Inc., 568 P.2d 753 (Utah 1977), the Utah Supreme Court determined that it was reasonable for a jury to find that a store owner had constructive notice of a dangerous condition in the store. See id. at 754-55. In that case, the plaintiff slipped and fell on some dry spaghetti on a grocery store floor. See id. at 754. According to the evidence presented at trial, "the spaghetti was dirty, crushed, broken into small pieces, and . . . extended from aisle ten around the end of that aisle into the main aisle for five or six feet toward the cash register at the front of the store." Id. The evidence also indicated that "a casual glance down the aisle" forty-five minutes before the accident was the only inspection of the store floor during the store's busiest time of day. Id. at 755. Moreover, the aisle in which the spaghetti was strewn was visible from the cash register. See id. Affirming the jury verdict in favor of the plaintiff, the supreme court concluded that the evidence supported a jury finding that the dangerous condition had existed for some time, and that the store owner had constructive notice of the condition. See id.

¶16 In this case, there is no direct evidence suggesting that the puddle of water had been there for any significant period of time. Further, there was nothing about the puddle itself suggesting that it had been there for a long time. Nor is there any reasonable inference that the store owner should have been aware of a four-inch puddle of water on the hardwood floor. Therefore, we conclude that conjecture and speculation is the only way to determine the length of time the puddle was on the floor, and thus, it would be improper to impute constructive notice to Defendants.

B. Temporary Condition Created by Hickory Kist's Owner or Employee

¶17 Second, Jex argues that even if Defendants did not have constructive notice of the dangerous condition, she can still recover under the temporary condition theory because either Fillmore or Barber themselves created the condition. Although it is well settled that a store owner must have notice of a dangerous condition, "[t]he variant of this rule . . . is that if the condition . . . was created by the defendant himself or his agents or employees, the notice requirement does not apply." Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623, 624 (Utah Ct. App. 1991) (quotations and citation omitted). In Silcox v. Skaggs Alpha Beta, Inc., 814 P.2d 623 (Utah Ct. App. 1991), the plaintiff slipped and fell on some water that came from melting bags of ice stacked on a stocking cart. See id. at 624. The

court found that a reasonable inference could be drawn that a cart for stacking groceries was left by a store employee, creating a foreseeable risk of harm. See id. at 624-25.

¶18 Again, in this case, there is no direct evidence indicating who actually caused the water puddle. Still, in Silcox we determined that "[i]t is for the jury to decide, even if only as a matter of inference, whether one of [a] defendant['s] employees created the risk of harm." Id. at 625 (emphasis added). In this case, the evidence suggests that the source of the water puddle could have been Fillmore, Barber, the Pepsi salesman, or even Jex herself. However, we note that while Jex was wearing boots with small tread, both Fillmore and Barber were wearing shoes with deep tread. Moreover, we note that Jex was the first customer of the day and slipped shortly after she entered Hickory Kist. Based on this evidence, a jury could reasonably infer that the puddle of water on the floor was caused by Fillmore or one of his employees, and thus, we reverse and remand as to the issue of whether Hickory Kist's owner or employee created the puddle of water.

II. Permanent Condition

¶19 Next, Jex asserts that she could recover under the permanent condition theory of liability because Hickory Kist used a wood floor that it knew was slippery when it became wet and because Fillmore failed to direct his store employees to use mats in areas of high customer traffic. Under this theory of liability, the dangerous condition must be both inherently dangerous and foreseeable. See Schnuphase v. Storehouse Mkts., 918 P.2d 476, 477 (Utah 1996).

¶20 In Canfield v. Albertsons, Inc., 841 P.2d 1224 (Utah Ct. App. 1992), the plaintiff slipped on a piece of lettuce in a grocery store. See id. at 1225. The store displayed its lettuce as a "farmer's pack," meaning that the lettuce did not have its wilted leaves removed. Id. The store placed empty boxes on the floor where customers could place the discarded lettuce leaves. See id. This court determined that "[i]t was reasonably foreseeable that some leaves would fall or be dropped on the floor by customers thereby creating a dangerous condition." Id. at 1227.

¶21 This same theory--that a store owner is liable for injuries caused by a foreseeable, inherently dangerous condition in the store--was addressed in Schnuphase v. Storehouse Markets, 918 P.2d 476, 478 (Utah 1996). However, in Schnuphase, the Utah Supreme Court limited the Canfield holding, noting that "[c]entral to [the court's] finding in Canfield was the determination that [the store] had notice of the potentially

hazardous condition, as evidenced by the store's placement of empty boxes and its instituting a regular schedule for inspecting and cleaning the produce section" of the store. Id. at 479. It emphasized that "inherent danger and foreseeability remain essential elements of the claim," id., and suggested some concern about extending a store owner's liability in method of operation cases, see id.; Babbitt v. 7-Eleven Sales Corp., 2000 UT App 50U (mem.) (indicating that the Schnuphase court "expressed concern with extending store owner liability in method of operation cases").

¶22 In Schnuphase, the plaintiff was injured when she slipped and fell on some ice cream that was on the floor in the deli section of the defendant's store. See id. at 477. The plaintiff claimed that the defendant failed to take the proper precautionary measures to ensure the store floor remained clear and safe for store customers. See id. at 479. The court concluded that the "plaintiff failed to present sufficient evidence on a claim of negligent mode of operation and that reasonable minds could not differ on the question of whether [the store owner] took reasonable precautions to protect its customers." Id.

¶23 In this case, given the limiting effect of Schnuphase and the lack of direct evidence indicating that Defendants chose a method of operation that was inherently dangerous and foreseeable, we conclude that Defendants were not negligent. Unlike the defendant in Canfield, Defendants did not have notice that they created a potentially hazardous condition.[3]

CONCLUSION

¶24 Under the temporary condition theory of negligence, we affirm the trial court's holding that neither Fillmore nor his employees had actual or constructive knowledge of the puddle of water creating the dangerous condition on Hickory Kist's floor. However, we reverse and remand as to whether Fillmore or his employees created the puddle of water. As to the permanent condition theory of negligence, we affirm the trial court's ruling that there is no evidence suggesting that Fillmore "chose a method of operation that created an inherently dangerous

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3. Based on our prior discussion, we do not find issues of material fact that preclude summary judgment, except as to whether the Hickory Kist store owner or employee created the puddle of water.

condition, and that the inherently dangerous condition was foreseeable."

Judith M. Billings, Judge

¶25 WE CONCUR:

Gregory K. Orme, Judge

William A. Thorne, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of July, 2007, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

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TRIAL COURT: FOURTH DISTRICT, AMERICAN FORK, 050100121
APPEALS CASE NO.: 20060571-CA

Appendix B

MAY - 5 2006

FILED IN
4TH DISTRICT COURT
AMERICAN FORK DEPT

2006 MAY -2 P 2:47

STATE OF UTAH
UTAH COUNTY

IN THE FOURTH JUDICIAL DISTRICT COURT
UTAH COUNTY, STATE OF UTAH

DONNA JEX Plaintiff, v. JRA, INC. dba HICKORY KIST DELI, JAMES FILLMORE and ANGELA FILLMORE, Defendants.	**RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT** Case No. 050100121 Judge Derek P. Pullan

This matter comes before the Court on the parties' Cross-Motions for Summary Judgment. On April 5, 2006, the Court heard oral argument. The Plaintiff Donna Jex was represented by Mr. Denton M. Hatch. The Defendants JRA, INC, dba Hickory Kist Deli, James Fillmore, and Angela Fillmore ("Defendants" or "Hickory Kist") were represented by Mr. Michael L. Ford.

After carefully considering the arguments and the law presented, the Court enters the following:

FINDINGS OF FACT

1. On the morning of January 26, 2004, there was new snow on the ground. James Fillmore, owner of Hickory Kist, arrived at work around 5:00 a.m. and entered through the back door. After removing snow and spreading ice melt in front of the store, he walked in the front door and walked to the back of the store to begin cooking. This occurred around 6:30 or 7:00 a.m.
2. An employee of Hickory Kist, Sharlene Barber, entered the store around 5:30 a.m. Around 7:00 a.m. she placed mats on the floor.
3. As part of her daily routine in opening the store, Barber turns on the lights, but cannot specifically remember turning on the lights that morning.
4. Barber believes that only she and Fillmore were in the area where the accident occurred before the Plaintiff.
5. Barber stated that there is never water on the floor in the mornings. She did not inspect for water and never has inspected for water in the morning. Because of her cooking and other responsibilities, it is unlikely she would have noticed water on the floor by chance.
6. Barber was working behind the front counter at the time of the accident. The place where the accident occurred is about 8 feet in front of the counter. Standing behind the counter, one can see the place where the accident occurred.
7. Plaintiff Donna Jex came into the store prior to 8:30 a.m. and was the first customer that day. When Jex entered the store, the lights were dim as if some had not been turned on.

8. Before Jex entered that morning, a Pepsi salesman had come in and walked to the back of the store.

9. When a person comes into the front door of the store, he or she walks across about 25 feet of mats before he or she arrives at the cash register. With the cash register on the left, the person can step off the mats to go to the back of the store on the hardwood floor.

10. When Jex reached the area of the cash register, she turned to the right to go to the back of the store. She intended to make a large order and saw no one at the front counter. As she turned, she slipped on the floor.

11. As she was falling, Jex saw a puddle of water about 4 inches in diameter on the floor which caused her to fall.

12. While Fillmore did not inspect the floor prior to the accident that morning, he speculated that the water either came from his shoes or Jex's shoes. After the accident he inspected the area and found a small amount of water on Jex's boots and on the floor. He opined that there was a 90% chance the water came from Jex's shoes.

13. Jex was wearing boots with new, but small, tread.

14. Fillmore was wearing Asics or Adidas athletic shoes. Barber was wearing Skechers brand shoes with thick soles.

15. The owners of the store knew that for persons wearing hard rubber shoes, the hardwood floor was slippery when wet.

16. There were no warning signs that the floor is slippery when wet.

17. There were no mats in the aisle areas. Fillmore decides where to place the mats. He had previously placed a mat in the area where the accident occurred, but a mat was not there at the time of the accident.

18. Employees were not given formal instruction or training on inspecting the floors. However, keeping floors clean and water free is an important issue. Employees are instructed that if there is something on the floor, to drop what they are doing and take care of the floor. Employees wipe the tables throughout the day and ensure that everything is in proper order for customers.

19. The store floors are cleaned at night after the store is closed.

CONCLUSIONS OF LAW

A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). The court is to view all the facts and all reasonable inferences that can be drawn therefrom in the light most favorable to the non-moving party. Bowen v. Riverton City, 656 P.2d 434, 436 (Utah 1982). In opposing a motion for summary judgment, the plaintiff still has the ultimate burden of proving the elements of his or her cause of action. "When a party fails to make a sufficient showing of an element essential to the party's case...there can be no genuine issue of material fact since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Celotex Corp v. Catrett, 477 U.S. 317, 321 (1986).

A store owner "is not a guarantor that his business invitees will not slip and fall." Merino v. Albertsons, Inc., 975 P.2d 467, 468 (Utah 1999); Schnuphase v. Storehouse Markets, 918 P.2d 476, 478 (Utah 1996) (quoting Preston v. Lamb, 20 Utah 2d 260, 436 P.2d 1021, 1023 (Utah 1968). Accordingly,

the Utah Supreme Court has "recognized only two legal theories under which a plaintiff may recover against a business owner for injuries arising from a slip-and-fall accident." Id.

The first theory involves unsafe conditions of a temporary nature. The store owner must have either actual or constructive knowledge of the unsafe condition:

> The first [class] involves some unsafe condition of a temporary nature, such as a slippery substance on the floor and usually where it is not known how it got there. In this class of cases it is quite universally held that fault cannot be imputed to the defendant so that liability results therefrom unless two conditions are met: (A) that he had knowledge of the condition, that is, either actual knowledge, or constructive knowledge because the condition had existed long enough that he should have discovered it; and (B) that after such knowledge, sufficient time elapsed that in the exercise of reasonable care he should have remedied it.

Schuphase, 918 P.2d at 478 (quoting Allen v. Federated Dairy Farms, Inc., 538 P.2d 175, 176 (Utah 1975) The second theory involves unsafe conditions of a permanent nature and is based on the store owner creating the hazardous condition:

> The second class of cases involves some unsafe condition of a permanent nature, such as: in the structure of the building, or of a stairway, etc. or in equipment or machinery, or in the manner of use, which was created or chosen by the defendant (or his agents), or for which he is responsible. In such circumstances, where the defendant either created the condition, or is responsible for it, he is deemed to know of the condition; and no further proof of notice is necessary.

Schuphase, 918 P.2d at 478 (quoting Allen v. Federated Dairy Farms, Inc., 538 P.2d 175, 176 (Utah 1975).

Where a store owner's method of operation creates an unsafe condition, the condition must have been foreseeable and inherently dangerous. Schnuphase, 918 P.2d at 479; see also, Long v. Smith Food King Store, 531 P.2d 360, 362 (Utah 1973) (essential element in method of operation claims is that condition created by defendant is of such character that defendant has or should have notice of inherently dangerous condition). For purposes of analysis, method of operation claims are treated as being a

permanent condition. Id

DECISION

Temporary Condition

Case law is clear that where an unsafe condition is temporary, the store owner must have had actual or constructive knowledge of the condition, and had time to remedy it. A review of the case law applying the temporary condition theory is instructive

In Lindsay v Eccles Hotel Company, 282 P.2d 477 (Utah 1955), the plaintiff slipped in a small quantity of water on the floor of a coffee shop. Evidence indicated that a waitress had delivered water to plaintiff and her companion. However, the court found there was no evidence whether the waitress, the plaintiff, her companion, or other patrons spilled water, when it was spilled, or whether management knew of its existence. The court ruled that "[u]nder such circumstances, a jury cannot be permitted to speculate that the defendant was negligent."

In Koer v Mayfair Markets, 431 P.2d 566 (Utah 1967), the plaintiff slipped on a grape in defendant's store. There was no evidence to show the store knew or should have known of any hazardous condition, or that it had a reasonable opportunity to remedy the condition.

In Long v Smith Food King Store, 531 P.2d 360 (Utah 1973), the store was giving away small samples of pumpkin pie topped with whipped cream. Plaintiff slipped on one of the pieces of pumpkin pie. There was no evidence that a store employee or anyone else saw pie on floor prior to accident. Plaintiff argued that the manner in which the samples were distributed was inherently dangerous because of the likelihood that the slippery substance would be dropped on the floor. The court found that the defendant did not have notice that the foreign substance was on the floor for sufficient time that in due

care it should have been removed. The court rejected plaintiff's argument that giving away samples of pie was inherently dangerous.

In Allen v. Federated Dairy Farms, Inc., 538 P.2d 175 (Utah 1975), the plaintiff slipped on cottage cheese that was being given out as a sample. Neither the plaintiff, his wife, nor any of the store personnel saw cottage cheese on the floor prior to the accident. The only way to determine how it got there and for how long it had been on the floor was by inference and conjecture. Id. at 175. The plaintiff argued that the method by which the store handed out the cottage cheese made it foreseeable that customers would spill it on the floor. The court summarily ruled that there was "no showing of any dangerous condition of a permanent nature." Id. at 177.

In Schnuphase v. Storehouse Markets, 918 P.2d 476 (Utah 1996), the plaintiff slipped on a scoop of ice cream that another customer had dropped. The plaintiff claimed the store was negligent for not taking adequate precautionary measures to prevent or warn of such hazards. The court ruled that there was "no evidence or any basis from which a fair inference could be drawn that Storehouse Markets should have realized that there was ice cream on the floor or that it had the opportunity to remove it." Id. at 478. Plaintiff relied on Canfield v. Albertsons, Inc., 841 P.2d 1224 (Utah Ct. App. 1992) to argue that the store's method of operation created a situation where it was reasonably foreseeable that the expectable acts of third parties would create a dangerous condition or defect. The court distinguished Canfield and ruled that the plaintiff had not produced evidence of foreseeability of an inherently dangerous condition. Id. at 479. See below.

Finally, in Merino v. Albertsons, Inc., 975 P.2d 467 (Utah 1999), the plaintiff slipped on a kiwi, and a year later slipped on a jalapeno at the same store. The court found that the case did not involve

"an unsafe condition of a permanent, or even semi-permanent, nature....There is no testimony that the floor was permanently covered with fruit or vegetable debris...In short, this is a case arising from an unsafe condition of a temporary nature." Id. at 468. The plaintiff failed to provide evidence that Albertsons knew or should have known of the presence of the kiwi or jalapeno.

Plaintiff cannot recover under the first theory of liability. It is undisputed that no store employee had actual knowledge of water on the floor. Hickory Kist cleaned the floors at night after the store closed. Water did not collect or pool in the area of the accident that would suggest the area was frequently wet. Plaintiff acknowledges that she did not see water on the floor before she slipped. "Thus the only way to determine how it got there, or how long it had been there, is by inference and conjecture." Allen v. Federated Dairy Farms, 538 P.2d 175, 175 (Utah 1975).

Permanent Condition

Plaintiff concedes that the water on the floor of Hickory Kist was not a permanent condition, but contends that the store's method of operation created an inherently dangerous condition that was foreseeable. Method of operation is analyzed under the permanent condition theory of storeowner liability in slip-and-fall cases. Schnuphase, 918 P.2d at 479 (citing Long v. Smith Food King Store, 531 P2d at 362); Canfield v. Albertsons, Inc., 841 P.2d 1224, 1226 (Utah Ct. App. 1992) (the second theory of slip-and-fall cases or permanent condition theory governs the case).

Plaintiff argues that De Weese v. J.C. Penney Company, 5 Utah 2d 116, 297 P.2d 898 (Utah 1956), and Canfield support her position.

In De Weese, the plaintiff slipped in the entrance of defendant's store. It had been snowing for at least ten minutes and for up to half an hour before plaintiff entered the store. The floor was wet and

muddy, and there were no rubber mats or abrasives on the floor. The De Weese court noted that this was not a temporary condition. The entrance to the store was "terrazzo surfacing" which was "part of the permanent structure of the building." 297 P 2d at 901. "The evidence clearly show[ed] that the defendant knew of the characteristic of terrazzo to become slippery when wet, and that it was its custom, and the custom of other stores with similar surfacing to use rubber mats or grit to prevent slipperiness during stormy weather." Id. In upholding the jury verdict, the court noted that there was sufficient evidence for a jury to conclude that it had been raining for a long enough period of time that defendant should have employed its safety measures.

In Canfield v. Albertsons, the Utah Court of Appeals overturned the trial court's grant of summary judgment to defendant. Plaintiff slipped on a piece of lettuce. The heads of lettuce were being displayed in what is known as a "farmer's pack," in which the lettuce arrives from the farm without the damaged leaves being removed. Customers often removed and discarded the leaves from the lettuce they intended to purchase. Albertsons knew of this problem and placed empty boxes around the display for customers to discard the leaves and regularly patrolled the area. The Court of Appeals found that Albertsons chose a method of display where third parties would remove lettuce leaves and discard them. "It was reasonably foreseeable that under this method of operation some leaves would fall or be dropped on the floor by customers thereby creating a dangerous condition." Id. at 1227.

The Utah Supreme Court in Schnuphase limited the holding and precedential weight of Canfield. Schnuphase held that "[c]entral to its finding in Canfield was the court of appeals' determination that Albertsons had notice of the potentially hazardous condition..." 918 P.2d at 479 (emphasis added). Schnuphase ruled that a plaintiff must show that the inherently dangerous condition was foreseeable, and

expressed concern with extending store owner liability in method of operation cases. See also, Babbitt v. 7-Eleven Sales Corporation dba 7-Eleven Food Stores Corporation, 2000 UT App. 50 (not for official publication) (plaintiff slipped on mayonnaise packet on handicap ramp outside its store).

In the instant case there is no evidence that Hickory Kist chose a method of operation that created an inherently dangerous condition, and that the inherently dangerous condition was foreseeable. Unlike the defendant in Canfield, Hickory Kist did not have notice that it had created a potentially hazardous condition.

CONCLUSION

It is regrettable that Ms. Jex suffered injuries. However, "not every accident that occurs gives rise to a cause of action upon which the party injured may recover damages from someone. Thousands of accidents occur everyday for which no one is liable in damages, and often no one is to blame." Schnuphase, 918 P.2d at 479-80, quoting, Martin v. Safeway Stores Inc., 565 P.2d 1139, 1142 (Utah 1977).

Based on the foregoing, the Defendant's motion for summary judgment is granted, and the Plaintiff's motion for summary judgment is denied. The Court requests counsel for Defendant to prepare an order consistent with this decision.

DATED this 2 day of May, 2006.

ORIGINAL FILED IN OFFICE CLERK STATE OF UTAH

JUDGE DEREK P. PULLAN

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 050100121 by the method and on the date specified.

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Dated this 2 day of May, 20 06

Melani Smith
Deputy Court Clerk